

Migrant Smuggling: *Canada's Response to a Global Criminal Enterprise*

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Received: May 31, 2013 Accepted: June 18, 2013 Available online: June 27, 2013

doi:10.11114/ijsss.v1i2.162

URL: <http://dx.doi.org/10.11114/ijsss.v1i2.162>

Abstract

Migrant smuggling is a dangerous, sometimes deadly, criminal activity. Failing to respond effectively to migrant smuggling and deter it will risk emboldening those who engage in this illicit enterprise, which generates proceeds for organized crime and criminal networks, funds terrorism and facilitates clandestine terrorist travel, endangers the lives and safety of smuggled migrants, undermines border security, and undermines the integrity and fairness of immigration systems. Introduced in the Canadian House of Commons in June 2011, the *Preventing Human Smugglers from Abusing Canada's Immigration System Act* (Bill C-4) includes proposed amendments to the *Immigration and Refugee Protection Act* that would enhance the existing offence of migrant smuggling, modify the general detention provisions for foreign nationals on arrival in Canada on grounds of serious criminality, criminality, or organized criminality, and require mandatory detention for groups of smuggled migrants. This article analyzes Bill C-4 and proposes amendments to it that would provide a more balanced response to migrant smuggling.

The article concludes by arguing that a comprehensive approach to addressing migrant smuggling ultimately requires three primary strategies be pursued together at the national and international levels: (1) national jurisdictions must take greater action to discourage illegal migration and disrupt migrant smuggling operations and through international cooperation; (2) national jurisdictions must establish more efficient refugee-determination processes and expedient procedures to remove failed claimants; and, (3) as part of the solution, the international community should continue to develop a proactive response to the global refugee situation.

Keywords: migrant smuggling, human smuggling, human trafficking, Canada, detention, sentencing, criminal law, immigration law, criminology, terrorism

1. Introduction

Virtually every country is affected by migrant smuggling, either as a source, transit location, or destination for smuggled migrants (United Nations Office on Drugs and Crime [UNODC], 2009). Global estimates of the number of smuggled migrants vary from 2.5 to 4 million persons per year (Royal Canadian Mounted Police [RCMP], 2006). Migrant smuggling is a dangerous, sometimes deadly, process for the smuggled migrants and its illicit proceeds fuel criminality. The UNODC (2009) has stated that migrant smuggling “must be combated as a matter of urgency.”

Migrant smuggling is defined in the broadly adopted 2001 United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* (“Migrant Smuggling Protocol”) as: “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”. The term “illegal entry” is further defined in this international treaty as “crossing borders without complying with the necessary requirements for legal entry into the receiving State”.

Migrant smuggling and human trafficking are often incorrectly used interchangeably in the media and by some commentators. However, the distinction between the two is significant with separate international treaties and different legal provisions governing them under federal law in Canada. Conceptually, migrant smugglers profit from fees paid to illegally transport individuals across international borders. On the other hand, human traffickers reap ongoing profits from exploiting vulnerable individuals through sexual exploitation, forced labour,

or the removal of organs (UNODC, 2008).

Typically, the relationship between smuggled migrants and their smuggler ends upon arrival in the destination country, whereas a human trafficker maintains control over trafficking victims in the destination country to extract ongoing profits through exploitation of the victim. Also, smuggled migrants by definition are foreign nationals whereas human trafficking victims include both Canadian citizens and foreign nationals. Furthermore, foreign trafficking victims may enter Canada legally or illegally (Perrin, 2010a & 2010b).

This article explores the multiplicity of reasons why migrant smuggling must be vigorously confronted and examines a recently proposed domestic legislative response in Canada: the *Preventing Human Smugglers from Abusing Canada's Immigration System Act* (Bill C-4). It then makes recommendations for the Government of Canada to effectively combat migrant smuggling as part of a multi-faceted national and international approach.

2. The Occurrence of Migrant Smuggling into Canada

There is little literature on migrant smuggling to Canada, such that most of the information on the extent of the problem comes from criminal intelligence reports, immigration records, and high profile publicly reported cases. Nevertheless, this evidence is very concerning and demonstrates that the practice of migrant smuggling into Canada is significant enough to warrant increased action from the federal government both in the development of legal tools and enhanced enforcement action.

Migrant smuggling has a longer history in modern Canada than many may suspect. Over the last three decades, there have been many high-profile incidents of migrant smuggling into Canada. These incidents have involved migrants from India, China, Sri Lanka and South Korea (among other countries). The largest single migrant smuggling event was the August 12, 2010 arrival of 492 Sri Lankans aboard the *MV Sun Sea*. Notable incidents are further described in the table below.

Table 1. Notable Migrant Smuggling Incidents Involving Canada

Date of Arrival	Vessel Name (if known)	Nationality of Smuggled Migrants	Number of Smuggled Migrants	Descriptive Notes
August, 1986 (Fennell et al., 1999; Knox, 2009; Canadian Press, 2010).		Sri Lankan	152	<ul style="list-style-type: none"> - Rescued from two 10 metre-long lifeboats off the Newfoundland coast. - The smuggled migrants were Tamil and sought refugee protection due to persecution in Sri Lanka. They had been in lifeboats for about 5 days after having been dropped off Canada's east coast by a larger ship. - Told the RCMP they had paid between US\$3,000-5,000 to be taken to Canada or the United States.
July, 1987 (Canadian Press, 2010).	<i>MV Amelie</i>	Indian (Sikh)	173	<ul style="list-style-type: none"> - The smuggled migrants were mostly Sikhs from the Punjab State in India. - The <i>Amelie</i>, a freighter that had carried them close to the Canadian coast, was later seized by the RCMP at sea and towed to Halifax. - The Sikhs claimed refugee status on the basis of fear of persecution in India
<ul style="list-style-type: none"> - July 20, 1999 - August 11, 1999 - August 31, 1999 - September 8, 1999. (RCMP, 2006; Canadian Press, 2010; Canadian Press, 2005; Charlton et al., 2002; Fennell et al., 1999; R. v. Li, 2001; R. v. Chen, 2001; Walker, 1999; Knox, 2009).	Four different ships: - First, third and fourth ships had no names. - Second ship identified as <i>HuegRyong Pusan No. 705</i> . - RCMP believed that two other	Chinese (mostly) Korean (nine)	600 (total): - 123 on July 20. - 131 on August 11. - 190 on August 31. - 146 on September 8.	<ul style="list-style-type: none"> - 577 made refugee claims – only 24 of which were successful. - 330 migrants deported. - 12 were allowed to stay in Canada in exchange for testifying against their smugglers. - Most of the rest of the migrants are believed to have entered the U.S. - Each had reportedly paid tens of thousands of dollars for their journey.

Date of Arrival	Vessel Name (if known)	Nationality of Smuggled Migrants	Number of Smuggled Migrants	Descriptive Notes
	ships slipped into Canadian waters undetected.			<ul style="list-style-type: none"> - Dealing with these ships cost between CAN\$40-70 million. - Nine Korean crewmembers were arrested from the August 11 ship, and charged with aiding a group of people to enter the country illegally and causing a person to disembark at sea. - Five convicted of organizing, aiding or abetting the coming into Canada of a group of persons who were not in possession of valid travel documents. - No high-level human smugglers were convicted.
November 2000 (Canadian Broadcasting Corporation [CBC], 2006).		Chinese	122	- Boat was found trying to surreptitiously enter Canada via Nootka Sound (300 km northwest of Victoria, B.C.).
Fall 2005 (RCMP, 2006).		Chinese	47	- Four cruise ships arrived on the East Coast, representing the first identified use of cruise ships to smuggle migrants into Canada.
February 2006 (RCMP, 2006).		Majority Chinese	~ 100	- Asian and East European organized crime groups responsible for smuggling migrants in the Windsor-Detroit area over a period of two years.
April 2006 (RCMP, 2006; Todd, 2006).		Indian and Pakistani	Dozens	<ul style="list-style-type: none"> - Smuggling ring on the West Coast responsible for smuggling migrants across the border into the U.S. - At least 50 illegal immigrants were detained in America, and 14 American and Canadian residents were charged with human smuggling related offences.
October 16, 2009 (RCMP, 2011; Bell, 2011a; Office of the Prime Minister, 2011).	<i>Ocean Lady</i>	Sri Lankan	76	<ul style="list-style-type: none"> - All 76 released under terms and conditions imposed by Refugee Board. - 4 arrested for human smuggling offences.
August 12, 2010 (Quan, 2011)	<i>MV Sun Sea</i>	Sri Lankan	492	<ul style="list-style-type: none"> - The refugee claims of approximately 50 migrants were blocked on suspicion of engaging in war crimes, human smuggling, or participation in terrorist organizations. - As of July 27, 2011, 15 admissibility hearings had been completed, resulting in 6 deportations on suspicions of war crimes, belonging to terrorist organizations or engaging in people smuggling and 9 migrants permitted to proceed with their refugee claims.

An unclassified criminal intelligence report by the RCMP (2006) reveals that smuggled migrants entering Canada include a mix of foreign nationals such as improperly documented migrants, economic migrants, criminals, and terrorists. This directly contradicts extravagant claims made by opponents of Bill C-4 that: "All of our [Canada's] smuggled migrants are refugees from conflict zones" (Saunders, 2010).

Smuggled migrants enter Canada by land, sea, or air. Migrant smugglers play a significant role in facilitating illegal entry to Canada by a range of foreign nationals. According to a report released by Citizenship and Immigration Canada under the *Access to Information Act*, approximately 73% of improperly or undocumented migrants travelling by air to Canada "received assistance from a smuggler or smuggling group, or had paid for documents or other services" (Purdy, 1999). An analysis by the RCMP of detected migrant smuggling

occurrences in Canada between 1997 and 2002 found that “smugglers assisted almost 12 per cent of improperly documented migrants (14,792), who were intercepted in Canada or en route” (RCMP, 2006).

The illicit profits earned by migrant smugglers are generally their main motivation. The RCMP estimates that fees charged by migrant smugglers to reach Canada range from US\$20,000 to US\$60,000, and that migrant smugglers maximize their profits by smuggling in larger numbers at a time (RCMP, 2006). This explains the allure of mass smuggling and the phenomenon of maritime migrant smuggling to reach Canada from overseas, despite the virtual inevitability of detection of a large vessel. The alleged smuggling mastermind, who orchestrated the *MV Sun Sea* operation from Thailand, is believed to have netted a profit of \$1.6 million from the operation (Bell, 2011b).

3. The Imperative to Combat Migrant Smuggling

The UNODC (2011) rightly calls migrant smuggling a “deadly business.” Transnational criminals prey on hope and charge exorbitant fees in exchange for hazardous voyages that can take months or years. For hundreds, if not thousands of people, their voyages end fatally.

Despite international recognition of the need to confront migrant smuggling, there are apologists for migrant smugglers who characterize the actions of these criminals as “a private-sector immigration system” (Saunders, 2010), and “a critical role in assisting refugees to reach safety” such that migrant smuggling is “justified” (Hathaway, 2010). Despite this attempted whitewashing, let us make no mistake. Migrant smugglers are not humanitarians running some compassionate flotilla. As Justice Lemieux of the Federal Court stated in a decision related to the *MV Sun Sea* (*Canada v. XXXX*, 2010a):

The respondent is a participant in a massive smuggling effort for which she has paid a considerable amount of money. I recognize she may fear persecution in her native country. However, this form of seeking refugee status has no place in the proper application of humanitarian law.

The imperatives to address migrant smuggling in a more concerted way include Canada’s national security and interests, as well as concerns about the substantial risks involved to the smuggled migrants themselves. These concerns include that migrant smuggling:

- Generates illicit proceeds to organized criminal groups, criminal networks, and terrorist organizations;
- Funds terrorism and facilitates clandestine terrorist travel;
- Endangers the lives and safety of smuggled migrants;
- Undermines border security, with consequences for the Canada/U.S. border; and,
- Undermines the integrity and fairness of Canada’s immigration system.

3.1 Migrant Smuggling Generates Illicit Proceeds for Organized Criminal Groups and Criminal Networks

The preamble of the Migrant Smuggling Protocol (2001) states that it was adopted as a response to “the significant increase in the activities of organized criminal groups in smuggling of migrants”. A report by the Criminal Intelligence Service Canada [CISC] (2008) indicates that organized crime groups smuggle migrants into Canada, relying on several domestic and international transit points. More specifically, the RCMP (2006) has found that migrant smugglers who bring foreign nationals illegally into the country are: “Organized crime groups composed of recruiters, transporters and escorts, document suppliers, enforcers, support and debt collection, some of whom are corrupt government officials.”

Migrant smuggling operations are also connected to other serious crimes such as drug smuggling, firearms smuggling, money laundering, and governmental corruption (RCMP, 2006). For example, prior to its use as a migrant smuggling vessel, the *Ocean Lady* is alleged to have been utilized in weapons smuggling from North Korea to the Liberation Tamil Tigers of Eelam, better known as the Tamil Tigers. It also had a history of smuggling cocaine, explosives, and weapons as cargo (Bell, 2011c; Public Safety Canada, 2011b).

According to the RCMP (2006), Chinese migrant smugglers, also known as “snakeheads,” are perhaps the most notorious and effective at facilitating the smuggling of large numbers of Chinese migrants to North America. Their networks include forgery workshops, operational centres in transit countries, networks of corrupt officials, and a capital base to facilitate their operations (Beare, 2010).

3.2 Migrant Smuggling Funds Terrorism and Facilitates Clandestine Terrorist Travel

Terrorist groups have generated funds from migrant smuggling operations, and utilized the services of smugglers to facilitate clandestine terrorist travel and weapons smuggling.

In addition to its main Commission Report, the National Commission on Terrorist Attacks Upon the United States (the “9/11 Commission”) also published a staff report entitled *9/11 and Terrorist Travel* (Eldridge et al., 2004). The report cites linkages between migrant smugglers and global terrorism, indicating that terrorists from more than a dozen known extremist groups have been assisted by migrant smugglers to facilitate their

transnational travel. The Central Intelligence Agency has also warned of possible links between migrant smugglers and terrorist groups such as Hamas, Hezbollah, and Egyptian Islamic Jihad.

Another example of the blending of terrorism and migrant smuggling is Ansar al-Islam, an al-Qaeda-affiliated terrorist group that has been implicated in the March 11, 2003 Madrid terror attacks. The terrorist organization reportedly generated funding through sophisticated passport forgery units for illegal migration in Europe, while using that expertise to facilitate movement of its members into countries where they would carry out suicide missions, including in Spain and Iraq (Wall Street Journal, 2004).

A study by the Center for Migration Studies and International Organization for Migration projects that the linkages between terrorism and migrant smuggling are only likely to grow as legal channels become more secure: "As intelligence screening and visa security are tightened so as to stop terrorists from entering legally with valid visas, the threat of clandestine entry of terrorists using smuggling organizations will increase and so too will the security imperatives of international cooperation to combat human smuggling" (Chamie&Dall'Oglio, 2008).

A particular challenge of mass arrivals of smuggled migrants is the need for thorough screening of individuals who frequently arrive without any form of identification, to determine admissibility related to national security concerns, such as participation or involvement in terrorist acts or terrorist organizations. For example, the Minister of Public Safety challenged the admissibility of about 50 individuals who arrived on the *MV Sun Sea* on the basis of membership in a terrorist organization, engagement in war crimes and/or people smuggling. As of July 27, 2011, 15 of these inadmissibility claims have been processed, with six individuals deported and nine allowed to proceed with refugee claims (Quan, 2011).

3.3 Migrant Smuggling Endangers the Lives and Safety of Smuggled Migrants

Migrants are often forced to travel long distances in unsafe conditions. Migrant smugglers can be ruthless, sinking entire boatloads of would-be migrants to avoid capture or arrest by law enforcement officials (Beare, 2010). Women are particularly vulnerable to physical harassment, rape, and sexual exploitation during and after their smuggling (UNODC, 2010b).

Testimonies of migrants smuggled by ship from Africa to Europe reveal that their ships are often overloaded and poorly equipped (UNODC, 2010b). Sometimes they are not even given enough fuel to complete the voyage. The risk of shipwreck is further increased by the fact that the passengers themselves, who only get basic instruction from the smugglers before departure, sometimes drive the boats. Such travel exposes these migrants to inherent risks to their lives and safety. According to a UNODC study (2010b), an estimated 10,000 people have died trying to cross the Mediterranean Sea in the last ten years. Not surprisingly, maritime migrant smuggling is the deadliest form of illegal international smuggling of people. The UNODC (2009) describes in graphic detail what smuggled migrants endure, noting that thousands of people have been killed as a result of "the indifference or even deliberate cruelty" of migrant smugglers:

Smuggled migrants are vulnerable to exploitation and their lives are often put at risk: thousands of smuggled migrants have suffocated in containers, perished in deserts or drowned at sea. Smugglers of migrants often conduct their activities with little or no regard for the lives of the people whose hardship has created a demand for smuggling services. Survivors have told harrowing tales of their ordeal: people crammed into windowless storage spaces, forced to sit still in urine, seawater, faeces or vomit, deprived of food and water, while others around them die and their bodies are discarded at sea or on the roadside.

Depending on the distances to be travelled, method of travel, and routes taken (which can be quite circuitous to avoid detection), the total smuggling journey may last from days to months to even years before the final destination is reached (RCMP, 2006).

Migrant smuggling is not a "service" – its practitioners are predatory and opportunistic. Both smugglers and smuggled migrants must be substantially deterred from engaging in the practice. Migrant smuggling cannot be a viable policy option for even legitimate refugees to come to Canada.

3.4 Migrant Smuggling Undermines Border Security, With Consequences for the Canada/U.S. Border

An inability to effectively combat migrant smuggling may also have consequences on Canada's international relations, particularly with the United States. For example, it has been claimed that a significant portion of Chinese migrants smuggled into Canada eventually make their way (sometimes by illegal means) to the United States (Beare, 2010). An inability to clamp down on illegal entry in Canada may lead to a further heightening of security at the Canada-U.S. border, and jeopardize trade and tourism that mutually benefit both countries.

However, it is notable that migrant smuggling into Canada, then into the United States is not the only scenario. Increasingly there is recognition that a reverse flow is also taking place. The CISC (2008) has observed: "Most

human smuggling activity takes place at border crossings in B.C. and Quebec, and to a lesser extent, Ontario. Despite activity in both north- and south-bound directions, there is a significant increase in illegal north-bound migration from the US into Canada.”

3.5 Migrant Smuggling Undermines the Integrity and Fairness of Canada's Immigration System

Migrant smuggling undermines the integrity of Canada's immigration system by circumventing legal channels to enter the country. Economic migrants who come to Canada illegally with the assistance of migrant smugglers are attempting to bypass the laws and procedures that millions of law-abiding newcomers to Canada have followed. Economic migrants who rely on smugglers are queue jumping. False refugee claims further over-burden an already backlogged refugee determination process. Migrant smuggling represents a “slap in the face” to those many migrants who patiently wait and apply to the proper channels to come to Canada (*R. v. Min*, 2005).

As noted by the CISC (2005), “[i]llegal migration has an impact on immigrants arriving legally into the country, as the costs associated with deportation and immigration hearings divert resources away from those arriving through legitimate processes.”

Indeed, migrant smuggling overburdens an already taxed Canadian immigration system. For example, it is estimated that the arrival of 492 Tamil refugee claimants from Sri Lanka aboard the *MV Sun Sea* in August 2010 has cost Canadian taxpayers at least CAN\$25 million (Bell, 2011b). In addition to these direct costs, one must take into account the time delays such an arrival imposes on an immigration system that is already known for its extreme wait-times.

4. Discussion & Analysis of the Preventing Human Smugglers from Abusing Canada's Immigration System Act (Bill C-4)

Bill C-4 includes a number of proposed changes to the *Immigration and Refugee Protection Act* (“IRPA”) that would: (1) enhance the existing offence of migrant smuggling, in terms of the elements of the offence, the penalties available, and recognized aggravating factors; (2) modify the general provisions of the IRPA to provide for detention of foreign nationals on arrival in Canada on grounds of serious criminality, criminality, or organized criminality; and (3) create a separate legislative scheme for groups of smuggled migrants, or other groups of foreign nationals who are “irregular arrivals”, who arrive in Canada that relate to detention, release, and eligibility for various immigration general benefits.

4.1 Migrant Smuggling Offence, Minimum Penalties, and Aggravating Factors

The low likelihood of detection, arrest, and prosecution combined with weak sentences against migrant smugglers form the basis for why this crime has flourished (RCMP, 2006). Therefore, Canada's laws against migrant smugglers must be enhanced, and more individuals who are accomplices and masterminds must be prosecuted in Canada, or through international cooperation in other jurisdictions.

Bill C-4 represents an improvement of the existing offence against migrant smugglers in the IRPA in a number of important ways. First, it improves the existing offence in section 117 of the IRPA that prohibits migrant smuggling (referred to as “organizing entry into Canada”) by amending the essential elements of the offence to more effectively target the full scope of what migrant smugglers do, and what mental fault they are likely to have. The prohibited conduct (*actus reus*) in section 117 is more accurately defined through Bill C-4 to encompass any contravention of the IRPA, not merely the more limited scope of the existing offence, which only relates to individuals who are “not in possession of a visa, passport or other document required by this Act.” The mental fault element (*mens rea*) is also defined in a more comprehensive manner to account not only for actual knowledge on the part of the accused migrant smuggler, but also recklessness – a lower level of mental fault where the accused subjectively perceives the risk that the entry would be in contravention of the IRPA, but proceeds anyway. It is appropriate for section 117 to include both knowledge and recklessness as subjective levels of mental fault for this offence, given that it is intended to encompass accomplices who may not have actual knowledge, but have a lower level of subjective fault such as recklessness or “deliberate ignorance” / “willful blindness” that still makes their conduct morally blameworthy. Furthermore, this change to the mental fault element of section 117 reflects a more realistic approach to the manner in which migrant smuggling networks operate, as they are often on a “need to know” basis (Note 1).

The second improvement to the existing migrant smuggling offence in the IRPA is with respect to the penalties. Bill C-4 would add a new section 117(3.1) to the IRPA that would provide for minimum terms of imprisonment that vary depending on the number of people smuggled (over or under 50 persons), and only apply if the alleged migrant smuggler “endangered the life or safety of, or caused bodily harm or death to” any of the smuggled migrants and/or if the offence was for profit or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group. This approach to sentencing is directly related to the primary harms of

migrant smuggling. It is a balanced approach that recognizes migrant smuggling encompasses a range of situations, some of which are more egregious and harmful than others, both with respect to the smuggled migrants themselves and Canada's national security. The table below summarizes the new sentencing regime established in Bill C-4.

Table 2. Proposed Mandatory Minimum Penalties of Imprisonment for Migrant Smugglers in Bill C-4

	Smuggling less than 50 migrants	Smuggling 50 migrants or more
Endangered life or safety, or caused bodily harm or death, or migrant	3 years	5 years
For profit or, for benefit or direction or association with criminal organization or terrorist group	3 years	5 years
Both of above situations together	5 years	10 years

Another set of amendments in Bill C-4 provides for aggravating factors, increases the statutory limitation period for commencing proceedings against migrant smugglers, and references the *Criminal Code* for definitions of "criminal organization" and "terrorist group." Each of these changes is welcomed by the author and should receive the support of Parliament.

4.2 Detention on Entry of Foreign Nationals for Serious Criminality, Criminality, or Organized Criminality (General Amendment)

Bill C-4 includes an amendment related to the grounds for detention of any permanent resident or foreign national upon entry into Canada. The proposed change to section 55(3)(b) of the IRPA would expand an immigration officer's grounds to detain a permanent resident or foreign national upon entry into Canada. The amendment would allow the officer to detain the individual in question if he/she had reasonable grounds to believe the permanent resident or foreign national was inadmissible to Canada on the grounds of "serious criminality, criminality or organized criminality" in addition to the existing list of grounds that include "security, violating human or international rights."

The concepts of criminality, serious criminality and organized criminality are already well known in the context of Canadian immigration law. For example, sections 36 and 37 of the IRPA define these concepts in the context of inadmissibility. Criminality applies only to foreign nationals and, generally, deems an individual inadmissible to Canada for a conviction for any indictable offence (or two convictions from different events) in Canada. Foreign convictions make a foreign national inadmissible on the same basis if the offence for which they were convicted constitutes an indictable offence under Canadian law. A foreign national can also be deemed inadmissible for committing an act in a foreign country, which constitutes an offence in the foreign jurisdiction and an indictable offence in Canada.

Serious criminality, generally, makes inadmissible to Canada permanent residents and foreign nationals who have been convicted in Canada for offences punishable, under Canadian law, by maximum jail terms of 10 years or more, or who have been sentenced to a jail term of more than six months. Foreign convictions for acts, which if committed in Canada carry these consequences, also suffice for serious criminality.

Organized criminality, generally, makes inadmissible to Canada permanent residents or foreign nationals who are members of organizations which are engaged in, or have been engaged in, a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an indictable Canadian offence, or in furtherance of an offence outside Canada which qualifies as an indictable offence under Canadian law. In addition, a permanent resident or foreign national is inadmissible for organized criminality for engaging in transnational crime, namely human smuggling or human trafficking or money laundering (Note 2).

While an analysis of the general grounds for detention and inadmissibility under Canadian immigration law is beyond the scope of this paper, I am of the view that these proposed changes are reasonable and important to protect Canadians and maintain public confidence in, and support for, Canada's generous immigration system that is of tremendous benefit to our country. The existing grounds for detention do not encompass other highly relevant considerations related to criminality, serious criminality, or organized criminality. The proposed amendment would help ensure that these factors may properly be considered in the detention review process, on an individualized basis.

4.3 Designated Foreign Nationals

Among the most contested aspects of Bill C-4 in public debate has been the provisions related to the designation of foreign nationals as part of human smuggling events or other irregular arrivals, and the consequences that flow under the proposed legislation from such a designation. In particular, exception has been taken to the

automatic mandatory detention without review for 1 year, and a number of disincentives that would distinguish between the timing of benefits available to designated foreign nationals and other inland refugee claimants. The analysis that follows elaborates on the proposed changes in Bill C-4 and identifies some necessary amendments to these aspects of Bill C-4.

4.3.1 Designation by Minister of Human Smuggling or Other Irregular Arrival

As discussed above, there is an economic incentive for migrant smugglers to engage in the smuggling of groups of individuals to maximize their profits, and the challenges presented in processing large numbers of smuggled migrants raises particular difficulties and concerns that are not apparent when a single individual seeks to enter Canada illegally. It is important to note that there is no particular mode of transportation specified in proposed section 20.1(1) of the IRPA.

In order to effectively address the smuggling of groups of migrants, there is a need for legal authority to provide for a means to single-out a situation as related to a migrant smuggling event or irregular mass arrival. This is the purpose behind proposed section 20.1(1) of the IRPA, which puts the authority to make such a determination in the hands of the Minister. The IRPA is replete with other instances where Ministerial decision-making is relied upon due to the complex nature of such determination, the fact that the determinations are, at least in part, affected by policy, and they must be made in real-time. As with all Ministerial decision-making authority, the designation provided for in proposed section 20.1(1) would also be subject to judicial review. As such, this is an appropriate approach.

The Minister's authority to designate a group of persons as designated foreign nationals requires the Minister to make an articulable determination that either: (a) it would not be possible to conduct the necessary identity or admissibility determinations in a timely manner, or (b) that there are "reasonable grounds to suspect" that the group arrival involves, or will involve the migrant smuggling offence in section 117(1) of the IRPA and thus is "for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group." Both of these reasons for designating a group arrival as an irregular arrival are justifiable and rational. They limit the Minister's decision-making ability appropriately, and provide clear grounds for judicial review.

It is furthermore reasonable to provide for a "group" versus "individual" designation based on the nature of the phenomenon that Bill C-4 is attempting to address. It is also notable that proposed section 20.1(2) of the IRPA permits any foreign national who is otherwise part of a designated irregular arrival to be exempt from being a designated foreign national if "they hold a valid visa or other document required under the regulations and, on examination, the officer is satisfied they are not inadmissible." Additionally, proposed section 58.1, discussed below, gives the Minister authority to release individuals who are designated foreign nationals at any time. The existence of these exceptions to group treatment of designated foreign nationals that are part of a single irregular arrival demonstrates that a balanced approach is being taken in Bill C-4 the tension between group designation and individual circumstances of those who are part of a designated irregular arrival. Furthermore, there are other aspects of individual assessments that are made once individuals become designated foreign nationals, including the determination of any refugee claims or applications for protection, identity, and admissibility. Such a balancing between group versus individual consideration is alluded to in the Supreme Court of Canada's decision in *Charkaoui v. Canada (Citizenship and Immigration)* (2007).

Proposed section 20.1(1), IRPA has been criticized by some for referring simply to "a group of persons" rather than specifying a certain number of individuals as necessary to engage the potential designation. I disagree. In my view, the approach in proposed section 20.1(1) on this point is sound. Were a number of migrants (e.g. 50 or 100 persons) specified in this provision, it could have the perverse effect of giving migrant smugglers specific guidance on the numbers they could smuggle without any concern whatsoever about engaging the consequences of the situation becoming designated as a human smuggling event or irregular arrival. The flexibility provided for in section 20.1(1) is sound.

4.3.2 Detention of Designated Foreign Nationals

Under Bill C-4, once an individual becomes a designated foreign national, proposed section 55(3.1) requires an officer to detain the individual on entry into Canada, or arrest and detain the individual after entry into Canada once the individual becomes a designated foreign national.

The ordinary IRPA provisions related to the release and review of detention of foreign nationals are modified in Bill C-4 in several ways. First, an officer may not release a designated foreign national before the first detention review by the Immigration Division (as may ordinarily be done under existing section 56 of the IRPA).

A designated foreign national must be detained under proposed section 56(2) until:

- A final determination on their claim for refugee protection or application for protection is made;
- The Immigration Division orders their release; or
- The Minister orders their release.

The first situation in which release from detention of a designated foreign national is available is based on a *bona fide* refugee claim or application for protection, and is relatively straightforward. The second and third situations require further elaboration and consideration.

Bill C-4 modifies the existing timeframes for detention reviews by the Immigration Division when the individual is a designated foreign national. Ordinarily, under section 57(1) of the IRPA, a detained foreign national is entitled to an initial review of their detention by the Immigration Division within 48 hours. If they are kept in detention, they are entitled to a further review at least once during the following 7 days following the initial review, and then subsequent reviews at least once during every 30-day period following each previous review, pursuant to section 57(2) of the IRPA. Under Bill C-4, proposed section 57.1 would instead provide for an initial review of a designated foreign national by the Immigration Division after 12 months of detention. Further reviews would take place every 6 months thereafter, for so long as the designated foreign national remains in detention.

The detention of foreign nationals, particularly the timeframes for review of detention, has attracted scrutiny by the Supreme Court of Canada based on challenges brought by detained foreign nationals relying on the *Canadian Charter of Rights and Freedoms* ["Charter"] (1982). In *Charkaoui v. Canada* (2007), the Supreme Court of Canada determined that the detention review timeframe for foreign nationals who were subject to security certificates (no review until 120 days after judicial confirmation of the reasonableness of the security certificate) infringed the guarantee against arbitrary detention and the right for prompt review of detention, under sections 9 ("Everyone has the right not to be arbitrarily detained or imprisoned") and 10(c) of the *Charter* ("Everyone has the right on arrest or detention [...] to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."). Chief Justice McLachlin, writing for a unanimous Court in *Charkaoui*, stated:

Permanent residents named in certificates are entitled to an automatic review within 48 hours. The same time frame for review of detention applies to both permanent residents and foreign nationals under s. 57 of the IRPA. And under the *Criminal Code*, a person who is arrested with or without a warrant is to be brought before a judge within 24 hours, or as soon as possible: s. 503(1). These provisions indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed.

The Court ruled that these infringements were not justified under section 1 of the Charter, and ordered that an initial review of detention of foreign nationals subject to a security certificate must take place within 48 hours of detention, and then every 6 months thereafter.

The table below summarizes the general detention review timeframes for foreign nationals under the IRPA and the provisions for foreign nationals subject to security certificates. It includes both the original statutory timeframe that has been struck down, and the modified timeframes as modified by the Supreme Court of Canada in *Charkaoui*, as well as the proposed detention review timeframes in Bill C-4 for designated foreign nationals.

Table 3. Detention Review Timeframes

Detention Review Timeframe	Initial Review	Further Review	Subsequent Reviews
Standard Provisions for Foreign Nationals: sections 57(1), (2), IRPA	48 hours	7 days	30 days
Foreign Nationals Subject to Security Certificate – <u>Struck Down</u> by Supreme Court of Canada in <i>Charkaoui</i>	120 days (after judicial confirmation of the reasonableness of the certificate)		
Modified by Supreme Court of Canada in <i>Charkaoui</i> – Foreign Nationals Subject to Security Certificates	48 hours	6 months	6 months
Designated Foreign Nationals: Bill C-4	12 months	6 months	6 months

Based on the precedent in *Charkaoui*, proposed section 57.1 of Bill C-4 would not survive a Charter challenge under ss. 9, 10(c). Simply put, given that the Supreme Court of Canada has ordered that foreign nationals under security certificates as terrorists must have their initial detention review within 48 hours, and then every 6 months thereafter, it is inconceivable that smuggled migrants who are designated foreign nationals could be detained without review for an entire year.

On the other hand, *Charkaoui* can be seen as permitting the differential treatment of particular categories of foreign nationals that raise pressing public interest concerns. The case for rigorously combating migrant smuggling has been described earlier in Part III of this paper. Furthermore, the ordinary detention review procedures for foreign nationals have proven to be costly, burdensome, and problematic when it comes to mass irregular arrivals such as the *MV Sun Sea*.

In *Canada (Minister of Citizenship and Immigration) v. XXXX* (2010b), the Immigration Division Member “acknowledge[d] the strained circumstances under which the Minister was operating dealing with a sudden and large influx of unknown immigrants.” There are significant challenges that are particularly relevant with irregular mass arrivals that warrant modified detention rules that relate to recognized and valid purposes of determining the identity of the individual foreign nationals, and determining their individual admissibility. With respect to identity, the jurisprudence of the Federal Court has been mindful of the centrality of identity as a “lynchpin of Canada’s immigration regime” (*Canada v. XXXX*, 2010a). In this decision, Justice Lemieux of the Federal Court stated:

the statutory and regulatory scheme shows the importance Parliament placed on the identity of a person for the purposes of immigration or entry into Canada, including those persons seeking its protection, expressing a particular abhorrence to human smuggling. Identity is one of the four self-standing classes which Parliament identified in section 58 as warranting special attention for a person's detention or release.

In another decision related to the *MV Sun Sea* case (*Canada v. XXXX*, 2010b), Justice Phelan of the Federal Court elaborated on the importance of determining the identity of foreign nationals as foundational to other assessments that must be undertaken:

Identity is a virtual *sine qua non* of immigration law. Identity is the springboard for such issues as admissibility, eligibility for refugee status and determination of the need for protection. It is also critical to an assessment of potential danger to the public, threat to security and flight risk, to name but a few of the issues for which identity is an essential component.

International treaty law on migrant smuggling also supports the detention of smuggled migrants for particular purposes. Bill C-4 follows the principal steps that are mandated by the Migrant Smuggling Protocol (2001): namely, that smuggled migrants themselves are not criminalized, but that they may be detained, and then returned to their home countries. Bill C-4 does not make it a criminal offence for an individual to be a smuggled migrant, or engage in such conduct. This is consistent with article 5 of the Migrant Smuggling Protocol (2001). The Protocol has very limited provisions dealing with the issue of detention of smuggled migrants. Article 16(5) provides:

In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol [migrant smuggling], each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

The UNODC Model Law on Migrant Smuggling recognizes detention of smuggled migrants, in accordance with legal procedures, for the purposes of identification or while awaiting removal as legitimate purposes for detention (UNODC, 2010a).

As demonstrated in the *MV Sun Sea* case and other mass irregular arrivals, identity is the first and most ubiquitous foundational issue in beginning to address individual foreign nationals in the group. The resources of RCMP, CBSA, and CIC, both in Canada and overseas in source and transit countries are substantial. The availability of reliable translators of the language spoken by a large number of new arrivals is also a challenge. All of these difficulties, and others, flow from the unique nature of a mass irregular arrival and distinguish these forms of migrant smuggling from more isolated individual cases, such as air and overland travel, thus justifying this particular focus of Bill C-4 on groups of designated foreign nationals.

The ordinary timeframes for review of detention are unworkable and inappropriate in such circumstances. However, Bill C-4 should be amended to bring the timeframe for detention reviews in line with something more likely to withstand a Charter challenge in light of *Charkaoui*. Bill C-4 could be amended to accomplish these

objectives by deleting proposed section 57.1(1) (renumbering and updating proposed section 57.1(2), (3) accordingly) and amending existing section 57(1) to also apply to designated foreign nationals. This would have the effect of providing for the ordinary 48 hour initial review of detention to apply to designated foreign nationals, but with a longer timeframe for further review, perhaps 3 months or 6 months (as proposed in section 57.1(2) of Bill C-4 and the same timeline as the modified detention review timeline set out by the Supreme Court of Canada in *Charkaoui*).

4.3.3 Release of a Designation Foreign Nation from Detention by Minister's Order

As mentioned above, proposed section 58.1 of the IRPA provides for the Minister to exercise his discretion to release individual designated foreign nationals at any time. It is prudent for such a provision to exist, and it should be understood that the range of circumstances that could warrant such Ministerial intervention are diverse and not completely foreseeable.

However, there may be categories of persons that can be identified in advance that should be clearly specified as falling outside of the designated foreign national provisions related to detention, and subjecting them to the ordinary rules related to the detention of foreign nationals. In particular, children are a category of foreign nationals that have been singled-out in section 60 of the IRPA, which states: "For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child."

The commentary to the UNODC Model Law (2010a) provides the following guidelines with respect to the detention of minors who are smuggled migrants:

Smuggled migrants who are children should not, as a general rule, be detained. Where detention is exceptionally justified (for example, for identification purposes), it shall be used only as a measure of last resort, for the shortest possible period of time and in an environment or setting that is appropriate for children (see article 37 of the Convention on the Rights of the Child). Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. The underlying approach in all situations should be "care" and not "detention".

Smuggled migrants who are children and are temporarily deprived of their liberty should be provided with all basic necessities, as well as appropriate medical treatment and psychological counselling, where necessary, and education. Ideally, this should take place outside the detention premises in order to facilitate the continuance of their education upon release. Children also have a right to recreation and play.

Given these considerations, Bill C-4 should be amended such that any individuals who are children (under 18 years of age) that are designated foreign nationals are explicitly exempt from the detention provisions that flow from being designated foreign nationals. Thus, they would instead be subject to the general rules in the IRPA and associated regulations and policy directives related to the detention of foreign nationals who are of such age (Citizenship and Immigration Canada, 2007). Such an amendment is consistent with Canada's general approach to the detention of minors who are foreign nationals, and complies with Canada's international legal obligations, without undermining the objectives being pursued by Bill C-4.

4.3.4 Other Consequences of Being a Designated Foreign National

As noted, Bill C-4 does not make it an offence to be a smuggled migrant. The proposed legislation instead preserves the right of smuggled migrants to claim refugee status or apply for protected status – despite their illegal entry into Canada – and also provides for release from detention, *inter alia*, once a final determination on their claim for refugee protection or application for protection is made.

It must be recalled that not all smuggled migrants are legitimate refugees or persons in need of protection. Indeed, the United Nations High Commissioner for Refugees (2007) has made the point that refugees should not be confused with economic migrants. Economic migrants use the services of migrant smugglers to enter Canada and may then falsely claim refugee status. It takes years to determine such claims and for the various immigration procedures and avenues for appeal and review to conclude before false claimants are eventually removed from Canada. In some instances, they may never be removed due to their going underground and failing to appear for removal or required hearings. As discussed in detail above, there are also an array of harms associated with migrant smuggling that justify suppressing the practice. Owing to all of these reasons, there is a need to ensure that migrant smuggling does not become a preferred or attractive method for illegal migration into Canada.

Bill C-4 attempts to further this imperative by providing for several disincentives once someone becomes a designated foreign national. In particular, it provides for a delay of five years, in most instances, before a

designated foreign national who subsequently is recognized as a legitimate refugee or person in need of protection can apply for permanent residence. Such consequential distinctions between lawful versus unlawful entry are reasonable measures. Indeed, many countries do not provide refugees who enter their countries legally with the same benefits that Canada would grant even to smuggled migrants under Bill C-4 who are found to be legitimate refugees or persons in need of protection (after the requisite waiting times have passed) (Note 3).

5. Conclusion

Migrant smuggling is a dangerous, sometimes, deadly criminal activity. It cannot be rationalized, justified, or excused. Failing to effectively respond to, and deter, migrant smuggling from both a supply and demand side will only risk emboldening those who engage in this illicit enterprise. Bill C-4 is just part of the overall action that is being contemplated by the government to address both these sides of migrant smuggling (Public Safety Canada, 2011a; Note 4).

With respect to Bill C-4, this paper has identified two necessary changes, namely: (1) initial review of detention of designated foreign nationals within 48 hours of detention, with further reviews every 3 or 6 months thereafter; and (2) an exemption for designated foreign nationals who are minors (persons under 18 years of age) from the detention provisions of Bill C-4, instead subjecting them to the general rules governing detention of foreign nationals who are minors. With these changes, Bill C-4 would provide for a more balanced response to migrant smuggling, particularly when it is considered in light of what other jurisdictions have done to address this problem.

A comprehensive approach to addressing migrant smuggling ultimately requires three primary strategies pursued together, at the national and international levels:

1. National jurisdictions must take greater action to discourage illegal migration and disrupt migrant smuggling operations through legislation like Bill C-4 and through international cooperation: Bill C-4 is part of the domestic legal response in Canada. International cooperation (bilateral and multilateral with source, transit, and destination countries, as well as through INTERPOL) must also continue to detect and disrupt migrant smuggling operations, with particular emphasis on prosecuting the masterminds behind these schemes.
2. National jurisdictions must establish more efficient refugee-determination processes and expedient follow-up to remove failed claims: it has been observed that “[l]engthy delays encourage frivolous claims and serve neither the interests of Canada nor genuine refugees” (Showler, 2009). While changes have been made to Canada’s refugee determination process to attempt to streamline the system, careful monitoring of the impact of those changes on the delays and backlog in the system is needed to ensure the system is “fast, fair and final” (*Ibid.*).
3. The international community should continue to develop a pro-active response to the global refugee situation as part of the solution: Canada already contributes proportionately a great deal towards helping to settle individuals and families who are in protracted refugee situations. It should continue to actively participate in the UN group processing of refugee programs, and encourage other countries to do more to promote so-called durable solutions to the growing global refugee population.

6. Post-script

As of June 2013, the Government of Canada has not proceeded with Bill C-4 beyond its Introduction and First Reading in the House of Commons. However, there have been several notable developments related to migrant smuggling involving Canada. On February 16, 2012, it introduced a revised proposal in the form of Bill C-31 (the “*Protecting Canada’s Immigration System Act*”) that brought forward most of the elements of Bill C-4, but with some notable changes. In particular, the detention review period for designated foreign nationals must occur within 14 days of initial detention or “without delay afterward”, and, if continued detention is ordered, a subsequent detention review can only occur six months after that initial review. If continued detention is ordered, subsequent reviews take place six months thereafter. Additionally, designated foreign nationals who are below the age of 16 are exempted from this special detention regime applicable to older designated foreign nationals (Béchar & Elgersma, 2012). Bill C-31 received Royal Assent to become law on June 28, 2012. On December 5, 2012, the Minister of Public Safety announced the first set of designations of foreign nationals in relation to five groups of foreign nationals who crossed the land border from the United States into Canada (Public Safety Canada, 2012a). Since 2010, a Special Advisor on Human Smuggling and Illegal Migration has been appointed to coordinate the Government of Canada’s operational response to human smuggling (Public Safety Canada, 2012b). In January 2013, the Government of Canada announced that other operations intended “to smuggle Sri Lankans to Canada from Thailand and Indonesia have also been disrupted in the past two years” (Citizenship and Immigration Canada, 2013).

A further recent development is that Justice Arne Silverman of the British Columbia Supreme Court has ruled in *R. v. Appulonappa* (2013) that section 117 of the IRPA (“No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.”) infringes the *Charter* because of over breadth and declared it to be of no force and effect. This case involves the prosecution of individuals in relation to the *Ocean Lady* incident. The Government of Canada is appealing the decision to the Court of Appeal for British Columbia.

Acknowledgements

The author is pleased to acknowledge research assistance from Simon Charles, Jim Cruess, and Tamlin Cooper. This article is based on a commentary paper of the same title for the Macdonald-Laurier Institute for Public Policy that was released on October 25, 2011 and was referenced during the Parliamentary and media debates surrounding Bill C-4. The author served as special advisor to the Prime Minister of Canada (2012-2013). The views expressed in this paper are only those of the author.

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Notes

Note 1: See, e.g., Perrin (2010a), pp. 47-48, 135.

Note 2: See IRPA, s. 37 (1) (b). It is important to note IRPA, s. 37 (2) which states that an individual cannot be deemed inadmissible solely on the basis that they entered Canada with the assistance of a person engaged in organized criminal activity.

Note 3: Article 31 of the 1951 *Convention relating to the Status of Refugees* (which prohibits “penalties” on account of illegal entry, where the individual presents themselves without delay and shows good cause for their illegal entry) is only engaged when the migrant is coming *directly* from the country they are fleeing from. A policy rationale for this approach is likely to prevent individuals from jurisdictional shopping, moving through transit countries until they reach a country that they would prefer, perhaps due to their more extensive benefits.

Note 4: Additionally, the CBSA Migration Integrity Officers network is active in 39 countries around the world to reduce illegal migration to Canada. There has been a large increase in the number of undocumented or illegal migrants seeking to come to Canada that have been intercepted overseas because of this initiative. According to the CBSA, “[i]n 1990 only 30% of inadmissible persons attempting to gain entry to Canada were intercepted overseas; by 2005 that number had increased to approximately 71%” (Jolicouer, undated).



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